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In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 1044

HAROLD WAPNICK, PETITIONER

v.

UNITED STATES OF AMERICA

No. 1074

JAMES LAFAZIA, CHARLES GLESH, AND DAVID BRILL, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The per curiam opinion of the court of appeals (Pet. No. 1044, pp. 13–14) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on March 27, 1963 (R. III, p. 950).[1] A petition for

[1] The record in this Court consists of the appendices to the briefs in the court below. "R. I" refers to the appendix of

rehearing was denied on April 9, 1963 (R. III. 955). The petition for a writ of certiorari in No. 1044 was filed on April 24, 1963. On April 26, 1963, Mr. Justice Harlan extended the time for the filing of a petition for a writ of certiorari by the other petitioners to and including May 6, 1963, and the petition in No. 1074 was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the evidence was sufficient to support the convictions for transporting motor vehicles in interstate commerce knowing them to have been stolen.

2. Whether the trial court's instructions were proper.

3. Whether the trial court committed other errors invalidating petitioners' conviction.

4. Whether the federal government was precluded from prosecuting petitioner Wapnick for transporting stolen motor vehicles in interstate commerce because he was acquitted in a state court of grand larceny and related crimes concerning different cars.

STATUTE INVOLVED

Section 2312 of Title 18 U.S.C. provides:

> Whoever transports in interstate or foreign commerce a motor vehicle or aircraft, knowing the same to have been stolen, shall be fined not

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the appellants and "R. II" and "R. III" to the first and second volumes of the appellee's appendices. We are lodging herewith a transcript of the trial court's instructions which will be referred to as "A."

more than $5,000 or imprisoned not more than five years, or both.

STATEMENT

Petitioners and twelve others[1] were charged in an indictment in the United States District Court for the Eastern District of New York, with transporting (in 16 counts), and conspiring to transport, stolen motor vehicles in interstate commerce in violation of 18 U.S.C. 2312, 371, and 2. After a jury trial, all of the petitioners were convicted on the conspiracy count. In addition, petitioner Wapnick was convicted on all sixteen substantive counts, petitioner Gersh on thirteen counts (counts 1-2, 4-7, 9-10, 12-16), petitioner LaFazia on three counts (counts 3-5) and petitioner Brill on two counts (counts 1-2). Petitioner Wapnick was sentenced to 3 years on each count, the terms on the substantive counts to run concurrently with each other and the term on the conspiracy count to run consecutively thereto. Petitioners Gersh, LaFazia, and Brill were sentenced on each count to 3½ years, 9 months, and 6 months, respectively, the sentences to run concurrently (R. 1, Docket Entries). The court of appeals affirmed *per curiam*.

The government's evidence at the trial included the following pertinent facts:

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[1] Seven of the defendants who have not petitioned entered pleas of guilty prior to trial. On the motion of the government the case against one other was dismissed and the case against two others severed. Two other defendants went to trial with the four petitioners.

In January 1959, petitioner Wapnick, an automobile parts supplier doing business in New York, approached two automobile repairmen who were his debtors, Roy and Monteiro (both of whom were co-defendants testifying for the government), with a plan whereby the two could pay their debts to him and make money for themselves. Wapnick explained that, instead of repairing automobile wrecks, it would be easier to steal cars matching the description of the wrecks, to transfer the serial number identification plates from the wrecks to the stolen cars, and to sell the stolen cars under the identity of the wrecks (R. II, 358, 364, 366; R. III, 549–550, 594–602). He said that he had professional thieves to do the stealing and the services of lawyers and bondsmen if there was trouble (R. II, 358; R. III, 602). Wapnick was to supply the money to pay the thieves and to buy the wrecks and was to sell the stolen cars after they had been "doctored up" (R. II, 375–376; R. III, 602). The two repairmen agreed to go along with the scheme (R. II, 364; R. III, 602).

In search of wrecks, Roy introduced Wapnick to petitioner Gersh, an owner of an automobile sales lot. Gersh was told by Wapnick that the wrecks were to be used in a stolen car scheme. Gersh agreed to, and did, supply the wrecks for prices as high as $1400 (R. III, 511). Under instructions from Wapnick, Gersh also issued state certificates of sale (known as MV 50's) for the wrecks indicating the sale of the cars by his company. The documents were, at the direction of Wapnick, at first issued to fictitious purchasers and later to Robert Ezersky, a used car

dealer who was a co-defendant (R. II, 400–410, 421; R. III, 552–553).

The wrecks purchased by Wapnick from Gersh and other sources (R. II, 410; R. III, 515, 517, 519, 605, 611) were usually taken to Roy's garage where the repairman would remove the serial number plates and cut up the wrecks (R. II, 410; R. III, 606). When the demolishing operation at the garage became too dangerous, Wapnick asked Gersh to permit the wrecks to remain on his lot after the serial number plates had been removed. Gersh agreed to this for the payment of an additional $50 above the cost of the wreck (R. II, 404–406, 409–413). After a serial number plate and MV 50 form had been obtained, the thieves would be told to bring in a car of the same model and make as the wreck (R. III, 497). The thieves would bring the stolen cars to Roy's garage at night (R. III, 737). They were paid with money supplied by Wapnick (R. II, 443, 470; R. III, 497, 513, 515, 520, 524, 535). In the garage, the serial number plates from the stolen cars were replaced with the plates taken from the wrecks. The stolen cars were cleaned and in some instances repainted (R. II, 413; R. III, 735).

After the stolen cars were altered, some sixteen or seventeen (eleven of which were involved in counts 6–16 (R. I, 6–10) were purchased by one Steinbrecher, owner of a Bronx, New York, wholesale auto sales company, to whom Wapnick was introduced by petitioner LaFazia (R. III, 770–774). Steinbrecher told Wapnick that any cars he purchased would have to be accompanied by proper papers showing the

passage of titles since such cars would be shipped out of the state. Wapnick stated that he would have the title papers made out in the name of Robert Ezersky. It was agreed that Steinbrecher's checks in payment for the cars would be made payable to Ezersky, but delivered to Wapnick (R. III, 770–773, 819–820).

In early July of 1959, Steinbrecher became suspicious when Ezersky refused to give him a MV 50 form for a 1959 Oldsmobile (which is involved in overt act 20, in the conspiracy count (R. I, 14)). He told Wapnick who came in for payment that he would hold the car, have the police auto squad check it, and pay him the following day (R. III, 774–775). Wapnick left, called Roy, told him of Steinbrecher's suspicions, and asked Roy to pick up the car. Roy refused to comply, telling Wapnick to send his friends, petitioners LaFazia and Brill, to pick up the car (R. III, 524–525). An hour or two later Brill picked up the Oldsmobile signing the receipt with an illegible and fictitious name (R. III, 775–782). Brill later told Roy that Steinbrecher had remarked that he thought there was something wrong with the car and that he (Brill) had told Steinbrecher to mind his own business (R. III, 528).

On July 4, 1959, Brill delivered this 1959 Oldsmobile to Di Napoli, a used car dealer in Waterbury, Connecticut, to whom Brill had been introduced by LaFazia. With the car Brill presented a form MV 50 bearing a fictitious name and Brill received a check made payable to this name (R. III, 693–695, 698–701, 707–708). This automobile was later identified by its

hidden serial number as one having been stolen on July 2, 1959 (R. II, 56, 59–60, 119–121). On July 8, Brill delivered to Waterbury two other cars which he had picked up from Roy's New York garage—a 1959 Oldsmobile and a 1957 Ford (R. III, 708–709) (which are involved in counts 1 and 2 (R. I, 4)). Although Brill at first wanted cash in payment, he accepted checks from Di Napoli after contacting Wapnick by telephone (R. III, 722–723). At Brill's request the checks were made payable to the names listed on the MV 50 forms—names which were in fact fictitious (R. III, 716–720). The two automobiles were identified as those stolen on July 7, 1959 (R. II, 27–28, 42–45, 123–126).

In the meantime, petitioner LaFazia had picked up from Roy's garage three cars stolen on March 16, April 24, and May 26, 1959 (R. II, 53–55, 51–52, 25–26), (which are involved in counts 3, 4, and 5 (R. I, 5)). In March and in May he delivered and sold the first two of these cars (a 1957 and a 1958 Chevrolet) to Di Napoli in Connecticut (R. III, 667, 675) and in June he delivered the third car (a 1959 Plymouth) to another Connecticut dealer (R. III, 659–661). LaFazia told the buyers to make two of the checks payable to New York firms with which he was associated. Two of the checks bore the endorsement of Wapnick's firm (R. III, 680–681, 672–675). A fourth car, a 1957 Chevrolet stolen on June 26 (overt act 28 of the conspiracy count (R. I, 15)) was picked up by LaFazia from the repairman, Monteiro, and delivered in June to Di Napoli in Connecticut (R. II,

61–63; R. III, 688). A check for this car, made payable to Ezersky, was endorsed by LaFazia and cashed for him by Di Napoli (R. III, 688–690). In May or early June, prior to the delivery of this car, LaFazia asked Monteiro whether the cars were "hot," adding if they were, "he [Wapnick] will have to straighten it out with money" (R. III, 616–619). Upon one occasion LaFazia took a stolen automobile to Steinbrecher together with papers upon which he had notarized the signature of a person purportedly transferring the car. There was no directory listing for any such person and no such residence address as that given for the notarized signature (R. III, 797–799, 802–804, 914–915).

ARGUMENT

1. The sufficiency of the evidence, upheld by the court below, presents no issue warranting review by this Court.

a. As to the substantive counts, it was necessary to show only that petitioners knew that the cars were stolen and that petitioners either themselves transported the cars in interstate commerce or aided and abetted the transportation. See *United States* v. *Tannuzzo*, 174 F. 2d 177, 180 (C.A. 2), certiorari denied, 338 U.S. 815; *United States* v. *Sherman*, 171 F. 2d 619, 623 (C.A. 2), certiorari denied *sub nom. Grimaldi* v. *United States*, 337 U.S. 931; *United States* v. *Crimmins*, 123 F. 2d 271 (C.A. 2); *Loftus* v. *United States*, 46 F. 2d 841, 847 (C.A. 7). The evidence in this case

clearly established both these elements as to the substantive offenses of which petitioners were convicted.

The claim of petitioners other than Wapnick that the evidence does not show knowledge that the cars were stolen is refuted by the record. Petitioners Brill and LaFazia transported some of the stolen cars shortly after the theft across state lines. With the stolen cars the two delivered false documents of transfer (one notarized by LaFazia), showing the purported owners to be Ezersky or fictitious persons with non-existent addresses. They collected checks in payment made payable to Ezersky or the fictitious persons. Brill had a conversation with Roy, and LaFazia with Monteiro, which demonstrated that they knew that they were not acting innocently (see the Statement, *supra,* pp. 6, 8).

As to Gersh, the evidence showed that he was told by Roy and Wapnick of the plan to steal cars and to replace the serial identification plates of the stolen cars with those taken from the wrecks purchased from Gersh. Yet Gersh agreed to, and did, sell wrecks to Roy and Wapnick for this purpose, for prices higher in many instances than the wrecks were worth (R. III, 511, 519). Gersh agreed to, and did, issue the certificates of sale in the names of fictitious persons and in the name of Robert Ezersky. He also agreed for a price over and above the price of the wreck to dispose of wrecks from which serial plates were removed. It is obvious that Gersh knew that the cars were stolen and aided and abetted their transportation in interstate commerce.

b. As to the conspiracy count, the jury was instructed that, in order to find the defendants guilty, it must find that they knew the stolen cars were to be transported in interstate commerce (A. 72–74). It could reasonably conclude that there was an implied understanding among the conspirators that the stolen cars were to be sold to any outlet that might prove convenient or accessible, including an interstate outlet. This was sufficient. See *United States* v. *Crimmins*, 123 F. 2d 271, 273 (C.A. 2). There was in addition considerable evidence of direct knowledge of interstate transportation. Wapnick, the key figure in the enterprise, was told by Steinbrecher that the cars would be shipped out of state. He also sent Brill and LaFazia to pick up some of the stolen cars which they transported to Connecticut (R. III, 491, 537). On one occasion Brill called from Connecticut to get the permission of Wapnick in New York to take a check in payment for a car (R. III, 722–723). Some of the checks received by LaFazia from Connecticut dealers bore the endorsement of Wapnick's firm (R. III, 672–675). There was thus ample evidence that interstate transportation was within the contemplation of the conspiracy.[3]

2. The trial court's instructions were entirely proper. The court told the jury that, with regard to the substantive counts, the government was not required to prove actual knowledge of transportation—

[3] It should be noted that, as to all the petitioners except Wapnick, their conviction on *either* the substantive or conspiracy charge is sufficient to sustain the judgment since they received concurrent sentences.

that all that was necessary was proof that the defendants could reasonably foresee that the cars would be resold outside the state (R. I, 168–171: A. 34–37, 72–74). See *United States* v. *Tannuzzo*, 174 F. 2d 177 (C.A. 2), and the other cases cited *supra*, p. 8. Petitioners have cited no authority to the contrary. In *Barfield* v. *United States*, 229 F. 2d 936 (C.A. 5) (see Pet. in No. 1074, p. 7), the court held that driving wholly within a state in furtherance of an intended interstate journey would fall within the statute. That case is, if anything, authority for the correctness of the instruction which petitioners challenge.

The court's summary of the evidence in its instructions, contrary to petitioners' assertion (Pet. No. 1074, pp. 10–11), is an example of judicious impartiality. The court not only outlined the government's evidence—which was characterized as such (A. 43, 66, 68, 81, *et seq.*)—but in turn developed at length the facts forthcoming from the defense cross-examination of government witnesses and summarized the defense testimony (see A. 43, *et seq.*). The trial judge reminded the jurors repeatedly that they had the sole responsibility of determining the facts, that his recollection of the evidence could be disregarded, and that their recollection must control (A. 4, 9, 42, 66, 169, 170).

There was nothing improper about the action of the court in omitting, during the reading of the substantive counts of the indictment to the jury, the names of the defendants not on trial (see Pet. No. 1074, pp. 6–7). The court specifically told the jury

at the time that it was not reading the names of the defendants originally charged but no longer on trial (A. 10, 18). The jury could not have been misled into thinking that those on trial were the only participants. Indeed, the jury was made aware of the identity and number of the defendants originally charged since, in reading the conspiracy counts, the court included the names of all the defendants (A. 21–30, 43) and a chart taken to the jury room by stipulation of the parties contained the names of all the defendants (A. 223–224).

It is difficult to understand how the compliance of the court with the request from the jury for a re-reading of a portion of its charge defining conspiracy could be termed prejudicial error (see Pet. No. 1074, p. 11). The portion read properly defined a conspiracy (see A. 68–74). Moreover, no objection or exception was taken to the re-reading.

3. Petitioners make numerous contentions as to other errors committed at their trial. All these contentions are plainly without merit.

a. Petitioners object (Pet. No. 1074, p. 8) to the testimony of one of the car owners that his automobile, when stolen, contained vacation supplies in the trunk (R. II, 3–4), because this testimony could have caused the jury to convict petitioners on charges other than those for which petitioners were on trial. This suggestion that the jury would totally disregard the trial court's instructions as to the charges on which petitioners were being tried is, to say the least, far-fetched. This evidence was properly admitted for the purpose of identifying the car—which was later de-

scribed by Roy, a co-defendant, as having contained pots, pans, and canned goods when delivered to his shop (R. III, 516).

b. The contention that the trial court committed prejudicial error in receiving hearsay testimony (Pet. No. 1074, pp. 8–9) is likewise erroneous. Petitioners object to the testimony of Roy on cross-examination that as far as he knew $4,600 was given to Gersh on a five-car deal.[1] However, there is no definite indication that the testimony was hearsay—petitioners' contention is based solely on the inference that if Roy had direct knowledge of the payment he would have been more positive.[2] In any event, the total amount of money Gersh received for five cars is immaterial in view of the overwhelming evidence of his complicity.

Similarly, the court properly overruled objections to the testimony of Steinbrecher's bookkeeper that she had tried unsuccessfully by telephone to obtain from Gersh title papers to a car purchased from Wapnick (see Pet. No. 1074, pp. 9–10). The objection was made that this was hearsay in that she did not know Gersh. However, the bookkeeper testified that she called the office of Gersh, and asked for, and spoke three times to a man who identified himself as Gersh (R. III, 892–898). Moreover, documentary evidence showed that Gersh had issued a certificate of sale for this car to a person with a non-existent ad-

[1] This testimony is not part of the record in this Court.

[2] Earlier, Roy testified on cross-examination that he "believed" that the $4,600 was paid directly to Gersh or different dealers (R. III, 551).

dress (R. II, 245, 286; R. III, 890–892, 917). Thus, the testimony objected to was of little, if any, importance.

c. Petitioners' assertion (Pet. No. 1074, pp. 12–13) of numerous irregularities, which were not argued in the court of appeals and are now made without elaboration or record documentation, deserves little comment. The claims, even if they had been properly raised, are obviously frivolous. Government witnesses are of course permitted to confer with the prosecutor. Rule 43 of the Federal Rules of Criminal Procedure specifically provides for continuing a trial when a defendant has voluntarily absented himself. The claim that some of the jurors were postoffice employees who knew one of the witnesses as their superior is totally unsupported by specific facts. The claim that there was no reporter present when "certain testimony" was re-read to the jury is not only unsupported, but the transcript shows that when the jury returned for further information upon two occasions it was the reporter who re-read the testimony (A. 231–244, 247–251). As to the assertion that Brill was denied the right to change lawyers, there is no such absolute right after the trial has begun. See *United States ex rel. Hyde* v. *McMann*, 263 F. 2d 940 (C.A. 2), certiorari denied, 360 U.S. 937; *United States* v. *Mitchell*, 137 F. 2d 1006, 1011 (C.A. 2).

4. Petitioner Wapnick claims (Pet. No. 1044, pp. 5–6) that, by virtue of his acquittal of crimes in the New York Bronx County Court, the prohibition against double jeopardy and the principles of *res judicata* and collateral estoppel barred the federal

prosecution against him. As the district court held (*United States* v. *Wapnick*, 198 F. Supp. 359 E.D. N.Y.), even if the federal prosecutions were predicated upon the same acts as the state prosecution, double jeopardy, *res judicata*, or collateral estoppel could not bar the federal prosecution, since the actions were brought by two different sovereigns for crimes punishable by each. *Abbate* v. *United States*, 359 U.S. 187; *United States* v. *Lanza*, 260 U.S. 377; *Serio* v. *United States*, 203 F. 2d 576, 578 (C.A. 5), certiorari denied, 346 U.S. 887; *Cosgrove* v. *United States*, 224 F. 2d 146, 150 (C.A. 9).

In actuality, however, the offenses were quite different. The state indictment consisted of six counts charging petitioner Wapnick and Robert Ezersky with grand larceny of money fraudulently obtained by means of false representations as to the ownership of cars (counts 1 and 2), with removing or defacing identification numbers of motor vehicles (counts 3 and 5), and with criminally receiving motor vehicles (counts 4 and 6).* The criminal charges involved only two automobiles, a 1957 Cadillac (counts 1, 3, and 4) and a 1958 Chevrolet Impala (counts 2, 5 and

* We are lodging with the Clerk of this Court a copy of the indictment in the Bronx County Court. As will be noted, the indictment did not charge a conspiracy. Therefore, while the evidence at the state trial included some details of the "hot car deal," the judgment of the state court could not have acquitted Wapnick of conspiracy. The averment of the concluding paragraph of the state indictment that the acts and transactions "constitute parts of a common scheme and plan" is a form of pleading in New York used for the purpose of consolidating indictments and does not charge a crime. See New York Code of Crim. Procedure, Sec. 279.

6), neither of which was involved in the federal indictment. Count 1 of the state indictment did mention that Wapnick had falsely represented that he had title to a 1958 Ford but it did not charge (as it did with respect to the car on which the count was based) that he did not in fact have legal title to the car. This car which is not the foundation of the state charge is the only one involved in the federal indictment (count 14). The federal indictment was directed against a large ring of car thieves engaged in interstate commerce—charging sixteen defendants in seventeen counts involving sixteen cars, fifteen of which were not mentioned in any way in the state charges. In these circumstances the present prosecution did not in fact duplicate the state prosecution and therefore did not violate the federal policy against duplicating state prosecutions. See *Petite* v. *United States*, 361 U.S. 529.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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